



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2005

Ms. Mary Marquez
Legal/ Records Manager
Capital Metropolitan Transportation Authority
2910 E. Fifth Street
Austin, Texas 78702

OR2005-04315

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224437.

The Capital Metropolitan Transportation Authority ("capital metro") received four requests for information regarding Request for Proposal #103703- Contracted UT Shuttle, AISD Magnet, and Fixed Route Services. You claim that the requested information may be excepted from disclosure under section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. Pursuant to section 552.305 of the Government Code, you notified First Transit, Inc. ("First Transit"), Connex North America, Inc. ("Connex"), Laidlaw Transit Services, Inc. ("Laidlaw"), McDonald Transit Associates ("McDonald"), MV Transportation ("MV"), ATC/Vancom, Inc ("ATC"), CUSA Transit of Texas, LLC ("CUSA") of the requests for information and of the right to submit arguments explaining why the information concerning each should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we note, that capital metro has not submitted for our review copies or samples of the internal documents relating to the award of the proposal to First Transit. Thus, we

assume that any information maintained by capital metro that is responsive to this portion of the request has been released to the requestor, to the extent it exists. If not, capital metro must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). In this instance, MV responded that it did not challenge the release of its proposal. This office has not received comments from Connex or CUSA explaining how the release of their proposal information will affect their proprietary interests. Although in its comments, McDonald asserted that its financial statements should be withheld, the company failed to claim any exceptions or submit any reasons as to why this information should be withheld from disclosure.

Thus, we have no basis to conclude that the release of any portion of these companies' proposals would implicate their proprietary interests. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, Connex, CUSA, MV, and McDonald's information must be released.

We now address the arguments claimed by the remaining companies. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the

business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t

Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

First Transit claims that its Pricing Proposal Volume One and Sections E and F of its Technical Proposal Volume Two are protected under section 552.110. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, First Transit's Pricing Proposal Volume One may not be withheld under section 552.110(a). However, we find that First Transit has demonstrated that its customer lists in Sections E and F of its Technical Volume Two are trade secrets that are excepted from release under section 552.110(a). First Transit also claims the release of its pricing information will harm its competitive interests. In this instance, First Transit was the winning bidder. The pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Accordingly, First Transit's pricing proposal is not excepted under 552.110(b) and must be released.

ATC claims that the marked pricing information contained in Tabs A and B of its proposal is protected by section 552.110(b). Although ATC claims an exception to the disclosure of documents entitled "Exhibit A Schedule- Revised 2/17/05, Best and Final Offer" and "Exhibit A Cost Breakdown- Revised 2/17/05," capital metro did not submit either document to this office, and therefore this ruling does not address the applicability of ATC's claimed exceptions for information that has not been submitted for our review by capital metro. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under the Act must submit a copy or representative samples of the specific information requested). ATC has demonstrated, however, that release of the remaining pricing information it seeks to withhold would result in significant competitive harm its interests for purposes of section 552.110(b). Accordingly, we have marked the pricing information in Tabs A and B of ATC's proposal that capital metro must withhold under section 552.110(b) of the Government Code. The remaining portions of ATC's proposal must be released.

Finally, Laidlaw claims that its entire proposal is a trade secret under section 552.110(a). After review of its arguments and the proposal, we determine that Laidlaw has not

demonstrated that its proposal meets the definition of a trade secret. We therefore determine that none of Laidlaw's proposal is excepted from disclosure under section 552.110(a). We do find that Laidlaw has demonstrated that release of its pricing information would result in significant competitive harm to its interests for purposes of section 552.110(b). The company has failed, however, to provide specific factual evidence substantiating its claims that release of the remaining portions of its proposal would result in significant competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue); 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, we have marked the pricing information in Laidlaw's proposal that capital metro must withhold under section 552.110(b) of the Government Code. The remaining information in Laidlaw's proposal must be released.

In summary, capital metro must withhold First Transit's Section E and F of its Technical Proposal Volume Two under section 552.110(a) of the Government Code. We have marked the pricing information of ATC and Laidlaw that must be withheld under section 552.110(b) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

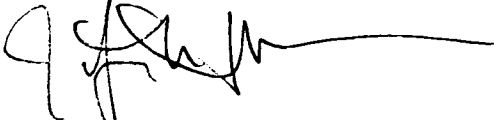
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jaclyn N. Thompson
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Open Records Division

JNT/krl

Ref: ID# 224437

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